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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1296

AMERICAN SMELTING AND REFINING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on February 14, 1969.

OPINION BELOW

The opinion of the Court of Appeals is reported at 406 F.2d 552, and is found in Appendix A, *infra,* p. 1a. The judgment of the court is found in Appendix B, *infra,* p. 6a. The decision and order of the National Labor Relations Board and the Trial Examiner's decision are reported at 167 N.L.R.B. No. 26, and are found in Appendix C, *infra,* p. 10a.

JURISDICTION

The judgment of the Court of Appeals was entered on February 14, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 19 of the Revised Rules of this Court.

QUESTIONS PRESENTED

1. Does an employer have a mandatory duty to bargain with a collective bargaining representative of its employees concerning the rentals charged for employer-owned housing facilities rented to some employees and others in the absence of substantial evidence in the record that the rentals charged constitute an element of wages or that the subject materially and substantially affects the terms and conditions of employment and is amenable to the collective bargaining process?

2. Is the National Labor Relations Board entitled to rely on unsupported presumptions and inferences in concluding that, under a given set of facts, a proposed subject of collective bargaining constitutes "wages, hours, and other terms and conditions of employment"?

STATUTES INVOLVED

The statutory provisions involved herein are portions of 29 U.S.C. § 158(a)(1) and (5), § 158(d) and § 159(a), reading:

> 158. UNFAIR LABOR PRACTICES
>
> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> . . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

. . . .

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: . . . .

159. REPRESENTATIVES AND ELECTIONS—EXCLUSIVE REPRESENTATIVES; EMPLOYEES' ADJUSTMENT OF GRIEVANCES DIRECTLY WITH EMPLOYER

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: . . . .

. . . .

July 5, 1935, c. 372, § 9, 49 Stat. 453; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 143; Oct. 22, 1951, c. 534, § 1(c, d), 65 Stat. 601; Sept. 14, 1959, Pub. L 86-257, Title II, § 201(d), Title VII, § 702, 73 Stat. 525, 542.

STATEMENT OF THE CASE

This case involves the meaning and the scope of the phrase "other terms and conditions of employment" in Section 8(d) of the National Labor Relations Act, and the legality of a decision of the National Labor Relations Board based substantially upon unsupported presumptions and guesses adverse to the employer.

Petitioner is a mining company which, as part of its Arizona operations, maintains a copper mine, crusher and concentrator at Silver Bell, Arizona, approximately forty miles northwest of Tucson, Arizona. The International Union of District 50, United Mine Workers of America (Ind.) (hereinafter called "the Union") has represented Petitioner's production and maintenance employees at that location for a number of years. Located near the mine is a townsite in which the Petitioner owns 199 dwelling units and 50 trailer spaces. The dwelling units consist of two- and three-bedroom houses, and two- and three-bedroom apartments. As of October 12, 1966, Petitioner employed 317 persons at the Silver Bell location. Two hundred eight employees lived in company-owned housing and 109 lived elsewhere. It is not a requirement that the employees live at the townsite. Petitioner maintains the townsite and pays all utilities. It also pays for garbage and trash collection. From the time when the company housing was first occupied in 1952, until September 1966, the rent did not change. The amount which was to be charged for monthly rent was unilaterally determined by the Petitioner, and the Union at no time ever overtly claimed that it had a right to be consulted as to the amount to be charged as rent. At no time during this period did the Union attempt to become involved with the operation of the housing

in any manner. The complete operation of the company housing was left solely to the discretion of the Petitioner, who made all decisions unilaterally as to its maintenance and operation. In September 1966, the Petitioner unilaterally increased the rent on two- bedroom houses by $5.00 per month, and on the three-bedroom houses by $10.00 per month. Rent on the apartments and trailer spaces remained unchanged. When Petitioner raised the rent, the Union protested, maintaining that the rent charged for company housing was a mandatory subject of collective bargaining, within the meaning of Sections 8(a)(5) and 8(d) of the Act, Sections 158(a)(5), 159(a), and Title 29, U.S.C. Petitioner maintained that it was not. The Union filed a charge with the National Labor Relations Board, and a complaint issued.

A hearing before a trial examiner was held on January 17, 1967, in Tucson, Arizona. The parties entered into stipulations as to a number of factual matters at the commencement of the hearing. The stipulated facts pertinent to this petition are as follows:

(1) Each occupant of a house, apartment or trailer space enters into a formal lease with Petitioner. (R.T. 9)

(2) The first labor agreement between Petitioner and the Union at Silver Bell, Arizona, was concluded on December 15, 1954, and was for a two-year duration. (R.T. 11)

(3) Additional labor agreements were negotiated in 1956, 1959, 1961, 1962 and 1964. The expiration date set forth in the then current labor agreement was September 30, 1967. (R.T. 11)

(4) No employee of the Petitioner is required to live at Silver Bell, Arizona, as a condition of his employment. (R.T. 12)

(5) Employees who do not live at Silver Bell, Arizona, whether salaried or bargaining unit employees, are paid at the same rate of pay as employees who live at Silver Bell, Arizona, for their respective occupational classifications. There is no travel allowance paid to employees who do not live at Silver Bell. (R.T. 13)

(6) Petitioner's townsite at Silver Bell, Arizona, is approximately forty miles from Tucson. The maintenance of the residences and townsite is performed by Petitioner's maintenance employees. The rents are paid by payroll deduction and all present occupants have authorized, in writing, payroll deduction for rent. (R.T. 16)

(7) Petitioner owns and operates a mine, crusher and concentrator known as the Mission Unit, approximately twenty miles southwest of Tucson. There are no housing units at the Mission Unit. Wages for comparable occupational classifications at Petitioner's Mission Unit are the same as, or slightly lower than, those at Petitioner's Silver Bell operation. No travel allowance is paid to employees of Petitioner at the Mission Unit. (R.T. 19)

At the hearing before the trial examiner, counsel for the General Counsel, apparently attempting to prove that the rentals charged by Petitioner were so low as to constitute an element of wages, sought to introduce evidence concerning the rentals for comparable housing in nearby communities. At first, this proffered evidence was in the form of what purported to be a portion of the classified section of *The Arizona Daily Star* published in Tucson. After this evidence

was rejected by the trial examiner, who characterized it as "the most flagrant of hearsay" (R.T. 32), counsel for the General Counsel attempted to establish a comparison of rentals between housing in Tucson and Silver Bell through the testimony of a Mr. Albert Avenetti, a staff representative of the Union who had formerly been employed by Petitioner at Silver Bell. Petitioner objected to such testimony on the grounds that Mr. Avenetti was not an expert, and the trial examiner sustained the objection (R.T. 39). These and other rulings of the trial examiner were later affirmed by the Board. The counsel for the General Counsel made no further attempt to introduce evidence to establish that the rentals charged for housing at Silver Bell were lower than the rentals charged for comparable housing in Tucson, and the other nearby communities, even though he had ample opportunity to do so (R.T. 39).

The General Counsel also introduced evidence in the form of testimony from Mr. Avenetti that the subject of company housing had been discussed in negotiations leading up to the most recent collective bargaining agreement as well as the prior negotiations (R.T. 42-45). Mr. Avenetti's testimony was impeached (R.T. 52-58), and the trial examiner declined to credit it.[1]

Although the trial examiner appeared to recognize the limitations on the scope of an employer's duty to bargain implicit in the statutory phrase "other terms and conditions of employment" discussed in this Court's decision in *Fibreboard Corporation* v. *NLRB,* 379 U.S. 203 (1964), he concluded that previous decisions of the Board compelled a finding that company-owned housing is per se a mandatory subject of col-

[1] Trial Examiner's Decision, p. 4, ll. 56-59.

lective bargaining.[2] The Board adopted the trial examiner's findings and conclusions, with exceptions not relevant here. In a footnote to its decision and order, the Board stated that the fact that no increase in rent was made during the 12-year period "indicates" that the rents were below the prevailing rate and that the convenience of living near the place of work gave the occupants of the housing advantages which "undoubtedly" affect their conditions of employment.[3] In another footnote, the Board stated that Petitioner had relied on the availability of company housing as a basis for rejecting the Union's bargaining demands in contract negotiations,[4] notwithstanding the fact that the only testimony to this effect had not been credited by the trial examiner.

Petitioner filed a petition with the United States Court of Appeals for the Ninth Circuit seeking to have the Board's order set aside. In its brief and argument to that court, Petitioner relied in part on the General Counsel's failure to prove by a preponderance of the evidence that the rentals charged were an element of wages or that they materially and substantially affected the employment relationship, citing *NLRB* v. *Bemis Bro. Bag Co.*, 206 F.2d 33 (5th Cir. 1953), a case similar to the case at hand. Petitioner also discussed the implications of this Court's decision in *Fibreboard* and the opinion of the Court of Appeals for the Fourth Circuit in *Westinghouse Electric Corporation* v. *NLRB,* 387 F.2d 542 (4th Cir. 1967). The Board

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[2] Neither the trial examiner nor the Board mentioned the Board decision to the contrary in Kohler Co., 128 N.L.R.B. 1062 (1960).

[3] Decision and Order, p. 1, n. 1.

[4] Decision and Order, p. 2, n. 1.

filed a cross-petition for the enforcement of its order relying in part on *NLRB* v. *Lehigh Portland Cement Co.*, 205 F.2d 821 (4th Cir. 1953).

Although rejecting the Board's argument that the subject of company-owned housing is per se a mandatory subject of collective bargaining, the Court of Appeals enforced the Board's order. In its opinion, the court relied in part on the discredited testimony of Mr. Avenetti, adopted the unsupported assumptions appearing in the footnotes to the Board's decision and made one assumption never mentioned by Petitioner, the General Counsel, the trial examiner or the Board.

REASONS FOR GRANTING THE WRIT

1. Conflict of decisions.

Three different Courts of Appeal have been squarely presented with the issue of whether the amount charged for rental of employer-owned housing is a mandatory subject of collective bargaining.[5] In all three cases,

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[5] Other cases have discussed the issue. In NLRB v. Hart Cotton Mills, 190 F.2d 964 (4th Cir. 1951), the court said by way of dictum that in many circumstances company-owned housing is "a necessary part of the enterprise." In Kohler Co., 128 N.L.R.B. 1062 (1960), *enforced*, Local 833, UAW v. NLRB, 300 F.2d 699 (D.C. Cir.), *cert. denied*, 370 U.S. 911 (1962), the Board itself concluded that occupancy of space in a company-owned hotel and in other company housing was *not* a condition of employment because (1) residence was not restricted to employees; (2) rents had not been shown to be below prevailing rates and (3) there was no showing that other nearby facilities were not available. See Board's brief to the Court of Appeals, p. 15, n. 16. Other Board decisions concerning the issue are Florida Citrus Canners Cooperative, 124 N.L.R.B. 1182 (1959); Elgin Standard Brick Mfg. Co., 90 N.L.R.B. 1467 (1950); and Abbott Worsted Mills, 36 N.L.R.B. 545 (1941), *enforced*, NLRB v. Abbott Worsted Mills, 127 F.2d 438 (1st Cir. 1942).

the Board concluded that the subject of the rentals for company-owned housing is a mandatory subject of collective bargaining.[6] In *NLRB* v. *Lehigh Portland Cement Co., supra,* and in the instant case, the Fourth and Ninth Circuits, respectively, enforced the Board's orders, holding that they were supported by substantial evidence. In *NLRB* v. *Bemis Bro. Bag Co., supra,* the Fifth Circuit declined to enforce the Board's order, holding that the subject was not a mandatory subject of collective bargaining and that the Board's decision and order to the contrary were not supported by substantial evidence. *Bemis Bro. Bag Co.* and *Lehigh Portland Cement* were decided some 15 days apart. Neither the employer in *Lehigh Portland Cement* nor the Board in *Bemis Bro. Bag Co.* sought review by petitioning this Court for a writ of certiorari.

In view of the fact that in all three cases the courts' decisions were based upon the particular facts, it might be argued that the cases can be distinguished and that there is therefore no conflict between the Circuits. However, an analysis of the cases demonstrates that any factual distinctions that can be made do not relate to the impact of company housing in a particular instance on the employment relationship.

A brief examination of the facts of the three cases makes it clear that they are hopelessly in conflict and provide no meaningful guidelines. In *Bemis Bro. Bag Co.,* where some 35% to 45% of the employees occupied company-owned housing, only three nonem-

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[6] A position it retreated from once, in Kohler Co., 128 N.L.R.B. 1062 (1960), *enforced,* Local 833, UAW v. NLRB, 300 F.2d 699 (D.C. Cir.), *cert. denied,* 370 U.S. 911 (1962).

ployees occupied such housing, and there was a waiting list of some 80 applicants, the subject was held not to be a mandatory subject of collective bargaining. In *Lehigh Portland Cement,* on the other hand, only 25% of the employees lived in company-owned housing, five of 65 housing units were occupied by "outsiders", and there was no mention of whether there was a waiting list for housing. Nevertheless, the court held that the company had a duty to bargain with the union about rentals. In the instant case, there was a waiting list of indeterminate numbers for the housing, some five or six housing units were occupied by nonemployees, and a larger percentage of employees (some 65%) lived in company-owned housing.

In its brief and argument to the Court of Appeals, Petitioner urged that the material facts in this case were similar to those in *Bemis Bro. Bag Co.* In its opinion, the court attempted to distinguish *Bemis* from the instant case in the following respects:

1. In *Bemis* the company plant and housing were on the edge of a town of 13,000, while in the instant case communities where there is other available housing are 25 and 40 miles away. (Petitioner submits that in a day and age when people think nothing of commuting an hour or an hour and a half to and from work, that fact is not relevant.)

2. The court pointed out that in *Bemis* only about a third of the employees lived in company houses, while in the instant case two-thirds did. (In no previous case on the subject has the percentage of employees living in company housing been mentioned as a relevant factor. If it is, the decisions in *Bemis* and *Lehigh Portland Cement* cannot possibly be squared.)

3. The court said that in the instant case "there is a waiting list for the housing." (It overlooked the fact that in *Bemis* there was a waiting list of some 80 people for the housing.)

4. It said that in *Bemis* public transportation was available, but that in the instant case "public transportation is apparently not readily available." (On this point, the court fell into the Board's error of relying on guesswork, there being no evidence in the record concerning the matter, the General Counsel having not seen fit to introduce any.)

In addition, the court relied upon the discredited testimony of Mr. Avenetti to the effect that the company relied upon the "availability" of company housing in rejecting the Union's bargaining demands for travel allowance pay. The fact that there are insufficient housing units at Silver Bell to house all of the employees in the bargaining unit would make it impossible for the company to reject a bargaining demand for travel allowance pay on the basis of the "availability" of company housing. In addition, the record shows that the Union never made a written contract demand with respect to the travel allowance pay, rentals charged for the housing or, for that matter, for any other aspect of the housing. (R.T. 84).

In the sense that there are some differences between the facts in the three cases, they can ostensibly be "distinguished". Such distinctions must be meaningful and must, in this situation, be relevant to the question of whether the subject of company housing can fairly be deemed to be included in the statutory phrase "wages, hours of employment, or other conditions of employment" based upon the facts in *Lehigh* and the

instant case, and excluded from the ambit of that phrase based upon the facts in *Bemis Bro.* Petitioner submits that the differences in the results of the three cases cannot be defended on the basis of distinctions between relevant facts bearing upon the impact of employer-owned housing on the employment relationship. The conflict makes it impossible for the many employers and unions involved to determine whether the rentals charged for company-owned housing is a mandatory subject of collective bargaining in a particular instance.

Until now, the opportunity has not presented itself for this Court to resolve the long-standing conflict between the decisions in *Bemis* and *Lehigh.* It should give this case plenary consideration to resolve the uncertainty which results from the conflict.

2. The decision of the Court of Appeals enforcing the Board's order departs from the guidelines for determining what subjects are mandatory subjects of collective bargaining set forth in this Court's decision in Fibreboard Corporation v. NLRB, 379 U.S. 203 (1964).

One of the most troublesome areas in the administration of the National Labor Relations Act is the meaning of the statutory phrase "wages, hours, and other terms and conditions of employment" appearing in Section 8(d) of the Act which determines those subjects which are mandatory subjects of bargaining for parties in a collective-bargaining relationship. The last time this Court gave plenary consideration to a case involving the meaning and application of this phrase was in *Fibreboard Corporation* v. *NLRB.* Although the Board has long taken the position that the phrase should be very broadly interpreted, that position has not been upheld by courts generally and

was not upheld by this Court in *Fibreboard*. In that case, this Court appropriately observed that replacement of bargaining unit employees with other employees not only affected conditions of employment, it affected the employment relationship itself. The Court was very careful to point out that it was not expanding upon the mandatory subjects of collective bargaining. It mentioned certain guidelines which, while not determinative, are often helpful in determining whether a subject is a mandatory subject of collective bargaining. One of these was whether industrial experience indicated that the particular subject lent itself to the processes of collective bargaining. The fact that clauses relating to contracting out often appear in collective bargaining contracts and subcontracting is "grist in the mills of arbitrators"[7] lent weight to the Court's conclusion that, in the context of those facts, subcontracting was an issue which could appropriately be resolved within the collective bargaining framework. That is not the case here, as there is no evidence whatsoever that employer-owned housing "has been brought widely and successfully within the collective bargaining framework."[8] The paucity of decided cases and published arbitration awards on the subject suggests that it has been neither widely nor successfully brought within the collective bargaining framework. Cases involving subcontracting or contracting out abound in published awards of arbitrators.[9] Petitioner is una-

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[7] Fibreboard Corp. v. NLRB, 379 U.S. 203, 212 (1964), citing United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960).

[8] *Id.* at 211.

[9] See pp. 787-817, Labor Arbitration Cumulative Digest & Index with Table of Cases, covering Vol. 31-40 Labor Arbitration Reports (The Bureau of National Affairs, Inc. 1964).

ware of a single published arbitration award concerning the issue of company-owned housing, suggesting, at the very least, that unions and employers at plants where there is company-owned housing do not consider that the subject lends itself to the processes of collective bargaining in the same way that the subjects of pensions, work rules, discharge and discipline and the like do. It is not difficult to understand why persons experienced in collective bargaining would conclude that subjects such as the adequacy of garbage service, quality of home repairs, frequency of repainting, and the whole myriad of subjects concerning a landlord-tenant relationship do not lend themselves to its processes.

Subsequent to the decision of this Court in *Fibreboard,* the Fourth Circuit considered a case not unlike the instant case in principle. In *Westinghouse Electric Corporation* v. *NLRB,* 387 F.2d 542 (4th Cir. 1967), Judge Boreman, speaking for the court, en banc, had the following comments about the correct determination of whether an issue falls within the statutory definition "other terms and conditions of employment":

> In the instant case we arrive at the conclusion, one which we believe is not inconsistent with past pronouncements of this court, that since practically every managerial decision has some impact on wages, hours, or other conditions of employment, the determination of which decisions are mandatory bargaining subjects must depend upon whether a given subject has a significant or material relationship to wages, hours, or other conditions of employment.
>
> The case before us does not even remotely involve any question of job security or any other issue which employees could traditionally consider

> "vital." Nor is there any evidence that the inclusion of this issue here within the collective bargaining framework is a wide-spread industrial practice. 387 F.2d at 548.

Petitioner submits that the foregoing statement is an accurate reflection of the scope of the duty to bargain as set forth in the decision of this court in *Fibreboard*. The comment that "the case before us does not even remotely involve any question of job security or any other issue which employees could traditionally consider 'vital'" could be made with as much validity in the instant case. No one's job, compensation, retirement rights, or working conditions are involved here. There is a point at which a subject, even though it may be of interest to some employees, does not have a significant or material relationship to wages, hours, or other conditions of employment. We may have reached that point here. The Court should hear the matter in order to determine whether the guidelines set forth in its decision in *Fibreboard* have been transgressed and whether they should be amplified.

3. This Court should determine the extent to which the National Labor Relations Board, or any other administrative agency, is entitled to base its decisions upon unsupported presumptions and guesses, an important question of federal law which has not been settled by this Court.

In the instant case, counsel for the General Counsel valiantly and laboriously attempted to introduce evidence to the effect that the amount of rentals was so low as to constitute an element of wages, thus bringing the subject within the statutory definition. He completely failed. The Board remedied this vacuum in the evidence by supplying a guess or presumption or, in its own word, an "indication" that the rents were below the prevailing rate by reason of the fact that

there had been no increase during a 12-year period. The Board is not reluctant to draw inferences unfavorable to employers. See *Westinghouse Electric Corporation* v. *NLRB, supra.*[10] Obviously, the Board is entitled to draw inferences in certain circumstances.[11] Such inferences must be based upon facts. Without something more in the record, the Board could not justifiably conclude that the fact there was no increase in the rents for twelve years meant that the rents were so low as to, in effect, be part of the tenant-employee's compensation. There are inferences just as plausible. Rental rates for comparable housing in Tucson and other nearby areas might well have remained substantially the same during the period, either because of a surplus of housing or for other reasons. If rental rates for housing in Tucson and other areas have increased, the Silver Bell rentals may have been higher in 1954 than those charged for comparable housing in the area, thus resulting in the rentals at all locations being approximately equal in 1966.

In a companion proceeding recently before the Board,[12] a trial examiner suggested that the Board was taking official notice of facts pursuant to the Administrative Procedure Act.[13] Petitioner submits that such an argument is patently absurd. Implicit in the doctrine of official notice is notice, and an opportunity to

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[10] The Board often draws such inferences in cases involving discharges for allegedly engaging in activity protected by the Act. See, for example, NLRB v. Billen Shoe Co., 397 F.2d 801 (1st Cir. 1968).

[11] See, for example, NLRB v. Fairmont Cremery Co., 169 F.2d 169 (10th Cir. 1948).

[12] American Smelting & Refining Co., 174 N.L.R.B. No. 117 (1968).

[13] 5 U.S.C. § 556(e).

be heard. An administrative body which purports to take official notice of a fact without giving an interested party an opportunity to be heard denies that party due process of law.[14] The General Counsel made such attempts to introduce evidence concerning rentals of comparable housing, Petitioner had no reason to believe that the issue would be resolved by the Board making an offhand reference to an "indication" in a footnote to its decision. In any event, the doctrine of official notice applies only to facts which are notorious and are common knowledge.[15] That the rentals charged for housing by this employer are lower than rentals for comparable housing in nearby communities is most assuredly not a matter of common knowledge to this Petitioner, much less to the Board.

Again, in an off-hand way, the Board determined a crucial issue by inserting a guess into the evidentiary vacuum when it stated in a footnote that the convenience of living near the place of work gave the occupants of the housing advantages which "undoubtedly" affect their conditions of employment. The Board apparently concluded that there was no reason to believe that any of Petitioner's employees could find it more advantageous to live in Tucson, a modern city of 300,000 inhabitants with its social, educational and recreational advantages. Surely it is not always considered to be an advantage outweighing other considerations for a person to live near his place of work.[16] Millions of Americans, undoubtedly including a substantial number of the members of the Bar of this Court, spend more time traveling to and from work than employees of Petitioner who live in Tucson.

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[14] Cook v. Celebrezze, 217 F. Supp. 366 (W.D. Mo. 1963).

[15] *Id.*

[16] The trial examiner himself recognized this. (R.T. 40)

It is one thing to supply an unsupported presumption or inference or take official or judicial notice of a matter of secondary importance. That is not the situation here. Here the Board supplies its inferences to support its basic findings on the very point in issue. As Mr. Justice Brandeis observed in *Ohio Bell Telephone Company* v. *Public Utilities Commission,* 301 U.S. 292, 301 (1937):

> Courts take judicial notice of matters of common knowledge. (Citations omitted) They take judicial notice that there has been a depression, and that a decline of market values is one of its concomitants. (Citations omitted) How great the decline has been for this industry or that, for one material or another, in this year or the next, can be known only to the experts, who may even differ among themselves. For illustration, a court takes judicial notice of the fact that Confederate money depreciated in value during the war between the states (citations omitted), but not of the extent of the depreciation at a given time and place. (Citations omitted) *The distinction is the more important in cases where as here the extent of the fluctuations is not collaterally involved but is the very point in issue.* (Emphasis supplied.)

In this case, the Board might have been justified in taking official notice of a general rise in prices during the period involved but not of an increase in the cost of a particular item in a particular locality, one of the very points in issue.[17]

In *Westinghouse Electric Corporation* v. *NLRB, supra,* the Board indulged in similar "presumptions"

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[17] The limitations on the doctrine of judicial notice set forth in Ohio Bell Telephone Co. v. Public Utilities Comm'n, 301 U.S. 292 (1937), are equally applicable to the use of official notice in administrative proceedings. U.S. *ex rel.* Dong Wing Ott v. Shaughnessy, 116 F. Supp. 745 (S.D.N.Y. 1953).

and "inferences" to remedy deficiencies in proof. The court had the following comments concerning these "inferences" and "presumptions":

> The Board majority then says:
>
> > "The fact is that a considerable number of employees do not wish to bring their lunches from home, and if they had to do so would *presumably* look for employment elsewhere. Such employees are in substance and effect captive customers of the on-site cafeterias, * * *." (Emphasis supplied.)
>
> As indicated, the conclusion that the employees who do buy lunches at the cafeterias would quit good jobs at high pay if they had to bring their own lunches is only a *presumption,* one unsupported by any evidence. Certainly no one suggested that an employee had to buy meals at the cafeterias or resign his job. Precisely the contrary is true. Most of the employees do not buy their lunches there and, of course, they have not quit their jobs. Stripped of unsupported presumptions and guesses, the statement of the Board majority is that anyone who prefers buying his meals in a cafeteria to bringing his lunch from home is, for that reason, a captive customer of the cafeteria. The only compulsion is the individual's own desire or preference, which is precisely the same as saying that there is no compulsion. 387 F.2d at 549.

In *Westinghouse* and in the instant case, to name only two, the Board has relieved the General Counsel of his burden of proving the commission of an unfair labor practice by relevant and material evidence. In *Westinghouse,* the Court of Appeals recognized that the Board's position was untenable, resting as it did

on unsupported presumptions and guesswork. This Petitioner was not so fortunate, and it respectfully submits that this Court should hear this matter on the merits to determine the extent to which the Board is entitled to base ultimate findings concerning the extent of the duty to bargain on such unsupported presumptions.

CONCLUSION

The questions presented by the instant case do not relate solely to employer-owned housing, important as that issue is. They relate to the entire administration of the National Labor Relations Act and are important and unsettled. They deserve to be settled in the interests of a reasonable administration of the Act, based on the realities of the collective bargaining process.

It is respectfully submitted that a writ of certiorari should issue to review the decision of the court below.

Respectfully submitted,

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Counsel for Petitioner

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Of Counsel

April 1969

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 22,216

AMERICAN SMELTING AND REFINING COMPANY, *Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

[January 22, 1969]

Petition to Review and Set Aside an Order of the National Labor Relations Board

Before: BARNES and HAMLEY, Circuit Judges, and McNICHOLS, District Judge*

HAMLEY, Circuit Judge:

This matter is before us on the petition of American Smelting and Refining Company (company) to review and set aside an order of the National Labor Relations Board, and upon the cross petition of the Board to enforce the order. The Board's decision and order are reported at 167 NLRB No. 26.

The Board determined that the rental of company housing accommodations adjacent to the company's Silver Bell, Arizona, mine is included among the conditions of employment of the Silver Bell employees represented by Local Union 13886, United Mine Workers of America (union). This being the case, the Board held that the company, by raising rental charges for this company housing without prior negotiations with the union, violated sections 8(a)(5) and (1) of the National Labor Relations Act, as amended (Act), 61 Stat. 136 (1947), 29 U.S.C. § 158(a)(5) and (1) (1964).

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* The Honorable Ray McNichols, United States District Judge for the District of Idaho, sitting by designation.

Accordingly, the Board ordered the company to cease and desist from unilaterally increasing rental charges without prior notification to, and bargaining with, the union. Affirmatively, the Board ordered the company to reinstate the lower rental charges in effect prior to the unilateral increases; to make whole, with interest at six percent per annum, all employees in the affected unit who had paid the increased rental charges; and to post appropriate notices.

Section 9(a) of the Act, 29 U.S.C. § 159(a) (1964), provides, in effect, that the representative designated by the majority of the employees of an appropriate unit of employees shall be the exclusive representative

> ". . . for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."

It is not disputed that the company increased the rental on its two- and three-bedroom houses adjacent to the Silver Bell mine without prior negotiation with the union. Thus the critical Board determination, which the company challenges, is that the rental rate for these company houses is a "condition of employment" of the affected employees within the meaning of the quoted statute.

In the decision and order under review, the Board adopted the findings and conclusions of the Trial Examiner with minor modifications of the Trial Examiner's recommended order. The Trial Examiner found, apparently as a matter of law, that:

> ". . . the rental of company housing accommodations [in a company town] is by its very nature an integral part of the employment relation and a valuable incident of the employer-employee relationship and thus, necessarily included among the conditions of the employees' employment and bargainable as a condition of employment whether or not it is treated as included within the term 'wages' as used in Section 9(a) of the Act."

In so deciding, the Trial Examiner relied on the decisions Board in *Bemis Bro. Bag Co.*, 96 NLRB 728; *Lehigh Portland Cement Co.*, 101 NLRB 529; and *Florida Citrus Canners Cooperative*, 124 NLRB 1182.

We think that the determination whether the rental of company housing constitutes a "condition of employment" within the meaning of section 9(a) of the Act depends upon an evaluation of the relevant facts of the particular case. *N.L.R.B.* v. *Bemis Bro. Bag Co.*, 5 Cir., 206 F.2d 33; *N.L.R.B.* v. *Lehigh Portland Cement Co.*, 4 Cir., 205 F.2d 821. Thus, we cannot accept the Trial Examiner's determination of this case as a matter of law. The Board, however, in its decision based on the Trial Examiner's findings, appears to have analyzed the facts and applied the test set forth in *N.L.R.B.* v. *Lehigh Portland Cement Co., supra,* at 823.

> "It is sufficient to bring them [company-owned housing] within the field of collective bargaining if their ownership and management materially affects the conditions of employment."

The Board found, in this case as in *Lehigh,* that the low rents[1] and the advantages of living near to the place of work in an area where housing was in demand materially affected the conditions of employment.

The essential facts are not in dispute. The company owns and maintains 175 two- and three-bedroom houses, twenty-four two- and three-bedroom apartments, and fifty trailer spaces in Silver Bell, Arizona, a town consisting solely of this company housing plus a few stores, a church and post office. There is a waiting list for the houses, and,

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[1] The Board used the same reasoning in this case as it did in *Lehigh* when it found that the fact that "no increase in rent was made between 1952 and 1966 indicates that the rents have been below the prevailing rate."

until the rent increase in 1966, the rents had been maintained at the 1954 level.[2]

All of the residents of the company housing are employees except for five or six who service the town's needs. As employees leave the company, they are asked to vacate the company housing. About seventy percent of the union members live in company housing at Silver Bell; approximately twenty-five percent live in Tucson, forty miles southeast, and the rest live in Cortaro and Marana, towns of under one thousand population located twenty-five miles to the east of Silver Bell. Silver Bell itself is located at the end of a gravel road, twenty miles from the nearest main road.[3]

Appellant argues that this case is "on all fours" with *N.L.R.B.* v. *Bemis Bro. Bag Co.*, *supra*, in which the court refused to support the Board's finding that the company housing was a "condition of employment." The circumstances of that case, however, are quite different from those in this case. There, the company plant and housing were on the edge of a town of thirteen thousand. Only about a third of the employees lived in the company houses, and housing and public transportation were available. In our case, on the other hand, the nearest private housing is about twenty-five miles away, two-thirds of the union members live in the company housing, there is a waiting list for the housing, the rent has not been raised in the past twelve years, and public transportation is apparently not readily available.

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[2] Although there are some vacancies in both the apartments and the trailer spaces, we have no evidence that either of these types of housing is comparable with the houses. In any event, only the rent for the houses has been increased.

[3] There was no explicit finding, nor testimony, on the availability of housing in the area surrounding Silver Bell. However, it is apparent from an examination of the hearing record that the nearest concentration of private housing is approximately twenty-five miles from Silver Bell.

In *N.L.R.B.* v. *Lehigh Portland Cement Co., supra,* where only twenty-five percent of the employees lived in company housing and nearly all of the employees lived within six miles of the plant, the court still found that:

> "the retention by the company of a sufficient number of dwellings to house 25 per cent of the employees near the plant in an area where houses are hard to get gives the company a means of affecting the living conditions of a large part of its working force through the power of granting or withholding the privilege and of fixing of terms . . ." *Lehigh,* at 823.

The record shows also that the company, in the early 1960's, relied on the availability of company housing as a basis for rejecting the union's bargaining demands for travel allowance pay. Thus, the Board found that the company regarded the rental facilities as one of the employees' conditions of employment.

We find that the facts here presented are sufficient to justify the Board's conclusion that the company housing, in this case, is a "condition of employment," and that the company must therefore bargain about its terms with the union. We affirm the Board's order and decision. The order of the Board will be

Enforced.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 22,216

AMERICAN SMELTING & REFINING COMPANY, *Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

Before: BARNES and HAMLEY, Circuit Judges, and McNICHOLS, District Judge*

Judgment

THIS CAUSE came on to be heard upon the petition of American Smelting & Refining Company to review and set aside a certain order of the National Labor Relations Board issued against petitioner on August 24, 1967, and upon cross-petition of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on November 7, 1968, and has considered the briefs and the transcript filed in this cause. On January 22, 1969, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Ninth Circuit that Respondent American Smelting & Refining Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing, upon request, to bargain collectively with Local Union 13886, International Union of District 50, United Mine Workers of America (IND.), as the exclusive representative of all the employees in the unit set forth and described in paragraph 3 of the Conclusions of Law

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* The Honorable Ray McNichols, United States District Judge for the District of Idaho, sitting by designation.

of the Trial Examiner's Decision, dated May 19, 1967, with respect to proposed changes in rentals at the Respondent's Silver Bell, Arizona, operation.

(b) Unilaterally increasing rental charges of company housing at Silver Bell, Arizona, without prior notification to, and bargaining with the Union.

(c) In any like or related manner interfering with the efforts of the above-named Union to bargain collectively on behalf of the employees in the above-described unit.

2. Take the following affirmative action which has been found will effectuate the policies of the National Labor Relations Act, as amended,

(a) Upon request, bargain collectively with Local Union 13886, International Union of District 50, United Mine Workers of America (IND.), as the exclusive representative of all its employees in the aforesaid unit with respect to any changes, now in effect or hereafter proposed, in rentals charged employees at company-owned housing and trailer parking areas at its Silver Bell, Arizona, facility.

(b) Immediately reinstate the rental charges in effect prior to the unilateral increase thereof at Silver Bell, Arizona, and make whole, with interest at 6 percent per annum, all employees in the above-described unit who have paid the increased rental charges.

(c) Post at its operation in Silver Bell, Arizona, copies of the attached notice marked "Appendix." Copies of said notice on forms provided by the Regional Director for Region 28, Albuquerque, New Mexico, shall, after being duly signed by a representative of the Respondent, be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify said Regional Director, in writing, within 10 days from the date of this Judgment, what steps the Respondent has taken to comply herewith.

ENDORSED: Judgment Filed and Entered

/s/ WILLIAM B. LUCK
William B. Luck
Clerk

A True Copy

ATTEST:

WILLIAM B. LUCK
Clerk

Judgment approved:

FREDERICK G. HAMLEY
U. S. Circuit Judge.

STANLEY U. BARNES
U. S. Circuit Judge.

RAY MCNICHOLS
U. S. District Judge.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A Judgment of the United States Court of Appeals enforcing an Order of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

> We Will Not refuse, upon request, to consult and bargain collectively with LOCAL UNION 13886, INTERNATIONAL UNION OF DISTRICT 50, UNITED MINE WORKERS OF AMERICA (IND.), as the exclusive representative of all the employees in the bargaining unit described herein, with respect to any changes in rentals charged for our company housing at Silver Bell, Arizona.

The appropriate bargaining unit is:

All employees in the classifications set forth in the collective-bargaining agreement, effective during the period from November 1, 1964, through September 30, 1967; excluding all other employees, office clerical employees, guards, watchmen, and supervisors as defined in the Labor Management Relations Act, as amended.

We Will, upon request, bargain with LOCAL UNION 13886, INTERNATIONAL UNION OF DISTRICT 50, UNITED MINE WORKERS OF AMERICA (IND.), as the exclusive representative of all the employees in the bargaining unit, with respect to any proposed changes in rentals charged for our company housing at Silver Bell, Arizona.

We Will, immediately reinstate the rental charges in effect prior to our unilateral increase thereof at Silver Bell, Arizona, and make whole with interest at 6 percent per annum all our employees in the above-described unit who have paid the increased rental charges.

We Will Not in any like or related manner interfere with the efforts of the above-named Union to bargain collectively on behalf of the employees in the above-described unit.

AMERICAN SMELTING & REFINING CO.
(Employer)

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Federal Building and U.S. Court House, 500 Gold Avenue, Room 7011, Albuquerque, New Mexico, 87101, Telephone No. 247-0311, Ext. 2538.

APPENDIX C

167 NLRB No. 26 D-86
Silver Bell, Arizona

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 28-CA-1435

AMERICAN SMELTING AND REFINING COMPANY

and

LOCAL UNION 13886, INTERNATIONAL UNION OF DISTRICT 50, UNITED MINE WORKERS OF AMERICA (IND.)

Decision and Order

On May 19, 1967, Trial Examiner Henry S. Sahm issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in, and was engaging in, certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief, the General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed a brief in reply to the General Counsel's cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case,

and hereby adopts the findings,[1] conclusions, and recommendations of the Trial Examiner, with the modifications noted below.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board orders that the Respondent, American Smelting and Refining Company, Silver Bell, Arizona, its officers, agents, suc-

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[1] We find no merit in Respondent's contention that the matter of company housing was not a mandatory subject of collective bargaining, where, as we here find, company ownership and management of rental facilities materially affect the employees' conditions of employment. That no increase in rent was made between 1954 and 1966 indicates that the rents have been below the prevailing rate. This circumstance, coupled with the convenience of living nearer to the place of work than the remaining employees, has given the occupants of the company's housing substantial advantages which undoubtedly affect their conditions of employment. See *Lehigh Portland Cement Company*, 205 F. 2d 821 (C.A. 4) enfg. 101 NLRB 529.

Moreover, the record shows that the Respondent, by relying on the availability of company housing as a basis for rejecting the Union's bargaining demands, in prior contract negotiations, for travel allowance pay for employees commuting to and from work, regarded its rental facilities as one of the employees' conditions of employment.

[2] We find merit in the General Counsel's exceptions to the Trial Examiner's failure to require the Respondent to (1) reinstate the rental charges in effect prior to Respondent's unilateral increase of the said rentals of its company housing at Silver Bell, Arizona, and (2) make whole with interest the employees who have paid the increased rental charges. In circumstances involving violations of Section 8(a)(5) by unilaterally altering established employment benefits, it is the Board's policy to order restoration of the *status quo ante* to the extent feasible and in the absence of evidence establishing that to do so would impose an undue or unfair burden upon the respondent. See *Southland Paper Mills, Inc.*, 161 NLRB No. 101. The recommended Order shall be amended accordingly.

cessors, and assigns, shall take the action set forth in the Trial Examiner's recommended Order, as herein modified:

1, Delete from paragraphs 1(a) and 2(a) of the Trial Examiner's recommended Order the phrase "the reasonableness of."

2. Substitute for paragraph 1(b) of the Trial Examiner's recommended Order the following:

"(b) Unilaterally increasing rental charges of company housing at Silver Bell, Arizona, without prior notification to, and bargaining with the Union."

3. Renumber paragraphs 2(b) and 2(c) as paragraphs 2(c) and 2(d) in the Trial Examiner's recommended Order, and insert the following as paragraph 2(b):

"(b) Immediately reinstate the rental charges in effect prior to the unilateral increase thereof at Silver Bell, Arizona, and make whole, with interest at 6 percent per annum, all the employees in the above-described unit who have paid the increased rental charges."

4. In the second sentence of paragraph 2(b), now renumbered paragraph 2(c), delete the words "to be furnished," and substitute the words "on forms provided. . . ."

5. Substitute for the notice attached to the Trial Examiner's Decision and marked "Appendix," the notice attached hereto.

Dated, Washington, D. C. Aug. 24, 1967

FRANK W. MCCULLOCH, Chairman
JOHN H. FANNING, Member
GERALD A. BROWN, Member

NATIONAL LABOR RELATIONS BOARD

(Seal)

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We Will Not refuse, upon request, to consult and bargain collectively with LOCAL UNION 13886, INTERNATIONAL UNION OF DISTRICT 50, UNITED MINE WORKERS OF AMERICA 50, UNITED MINE WORKERS OF AMERICA (IND.), as the exclusive representative of all the employees in the bargaining unit described herein, with respect to any changes in rentals charged for our company housing at Silver Bell, Arizona.

The appropriate bargaining unit is:

All employees in the classifications set forth in the collective-bargaining agreement, effective during the period from November 1, 1964, through September 30, 1967; excluding all other employees, office clerical employees, guards, watchmen, and supervisors as defined in the Labor Management Relations Act, as amended.

We Will, upon request, bargain with LOCAL UNION 13886, INTERNATIONAL UNION OF DISTRICT 50, UNITED MINE WORKERS OF AMERICA (IND.), as the exclusive representative of all the employees in the bargaining unit, with respect to any proposed changes in rentals charged for our company housing at Silver Bell, Arizona.

We Will, immediately reinstate the rental charges in effect prior to our unilateral increase thereof at Silver Bell, Arizona, and make whole with interest at 6 per-

cent per annum all our employees in the above-described unit who have paid the increased rental charges.

We Will Not in any like or related manner interfere with the efforts of the above-named Union to bargain collectively on behalf of the employees in the above-described unit.

AMERICAN SMELTING & REFINING CO.
(Employer)

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Federal Building and U.S. Court House, 500 Gold Avenue, Room 7011, Albuquerque, New Mexico 87101, Telephone No. 247-0311, Ext. 2538.

TXD-(SF)-72-67
Tucson, Arizona

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

Case No. 28-CA-1435

AMERICAN SMELTING COMPANY

and

LOCAL UNION 13886, INTERNATIONAL UNION OF DISTRICT 50 UNITED MINE WORKERS OF AMERICA (IND.)

Lewis Harris, Esq., of Albuquerque, New Mexico, appearing on behalf of the General Counsel.

John F. Boland, Jr., Esq., of *Evans, Kitchel & Jenckes*, of Phoenix, Arizona, for the Respondent.

Before: *Henry S. Sahm*, Trial Examiner.

The issue involves the Respondent's refusal to bargain with the Union by unilaterally increasing the rents of its company owned housing occupied by both employees and nonemployees but in which residence by employees was not mandatory.

Trial Examiner's Decision

STATEMENT OF THE CASE

Upon a charge filed October 3, 1966, by Local Union 13886, International Union of District 50, United Mine Workers of America (IND.), herein the Union, against American Smelting and Refining Company, herein Respondent or the Company, the General Counsel issued a complaint alleging Respondent violated Section 8(a)(5) and (1) of the Act.

The answer denied the commission of any unfair labor practices.

This proceeding, with all parties represented, was heard by Trial Examiner Henry S. Sahm at Tucson, Arizona, on January 17, 1967. At the conclusion of the hearing, the parties were given leave to file briefs which were received from the General Counsel and Respondent on February 21, 1967.

Upon the entire record in this case and from observation of the demeanor of the witnesses while testifying, there is hereby made the following:

Findings and Conclusions

I. The Business of the Respondent

Respondent is a New Jersey Corporation. It maintains a place of business at Silver Bell, Arizona, where it is engaged in the operation of a copper mine, crusher and concentrator. Annually it mines, sells, and distributes products valued in excess of $50,000, of which products valued in excess of $50,000 were shipped from said place of business directly to States of the United States other than the State of Arizona and it purchases materials valued in excess of $50,000 from States other than Arizona. Respondent is engaged in commerce within the meaning of the Act.

II. The Labor Organization Involved

Local Union 13886, International Union of District 50, United Mine Workers of America (IND.), is a labor organization within the meaning of the Act.

III. The Alleged Unfair Labor Practices

A. *The Issues*

The General Counsel contends that Respondent refused to bargain with the Union by unilaterally increasing the rents of company-owned housing occupied by both em-

ployees and nonemployees. The resolution of this issue turns on whether the rental of company-owned housing was:

(a) a mandatory subject of bargaining;

(b) an element of the employees wages; or

(c) a condition of employment

within the meaning of Section 8(a)(5) and 8(d) which provide it is an unfair labor practice for an employer to refuse to bargain with a union in respect to rates of pay, wages, and/or other terms and conditions of employment.

B. *The Testimony*

Respondent is engaged in the operation of copper mines, a crusher, a concentrator, and the necessary accessory facilities at Silver Bell, Arizona, which is located in a remote area of the State, approximately 40 mines from Tucson. Respondent started stripping the overburden from the mine at this location in December of 1951. The stripping operation and the mining operation itself were contracted out to Isbell Construction Company whose employees performed these operations until Respondent's employees took over their functions on April 1, 1957. Respondent's crusher and concentrator were completed in 1954 and the first production from the mine was shipped in that year. These facilities were manned by employees of Respondent.

At about the same time that Isbell Construction Company commenced the stripping operation for Respondent, Respondent began the construction of a townsite at Silver Bell. The first houses were occupied in the fall of 1952. The townsite, as it presently exists, consists of 175 detached single family dwellings of which 68 are 3-bedroom houses and 107 are 2-bedroom houses. There are also 24 two and three bedroom apartments and 50 trailer spaces.

Additionally, the site contains a grocery store, church, barber shop, post office, and service station. From 1952 until April 1, 1957, the houses, apartments, and trailer spaces were occupied by employees of both Isbell Construction Company and Respondent. Since April 1, 1957, none of the tenants have been employees of Isbell Construction Company.

Upon completion of the crusher and concentrator in 1954 Respondent recognized the Union as the bargaining representative of its production and maintenance employees at the Silver Bell unit. Since the mining employees at that time were employed by Isbell Construction Company the recognized unit did not include mining employees. The first labor agreement between Respondent and the Union, which was for a 2-year period, was concluded on December 15, 1954. Later agreements were negotiated in 1956, 1959, 1961, 1962, and 1964. The current agreement, negotiated in 1964 has a termination date of September 30, 1967. The mining employees of Respondent, after Respondent took over the mining operations, were included in the unit bargained for by the Union in 1956. The mining employees were covered by the 1956-1959 collective-bargaining agreement and every subsequent agreement since then.

As of October 12, 1966, Respondent employed 317 employees at its Silver Bell operation, of which 264 were bargaining unit employees and 53 were salaried employees. Of the 264 bargaining unit employees, 175 or approximately 66 percent lived in company housing at Silver Bell. The remaining 89 bargaining unit employees lived 40 miles away in Tucson and also in the intermediate communities lying between Tucson and Silver Bell. Thirty-three of the salaried employees live in company housing at Silver Bell. Five or six individuals not employed by Respondent also occupy company housing. These individuals are the barber, the minister, the grocery clerk and a few employees of Boyles Brothers which is performing drilling work for Respondent under a subcontract with Respondent.

Tenants of company housing enter into written leases with the Respondent covering terms of the tenancy. Operation and maintenance of the residences and the townsite is performed by Respondent's maintenance employees. Prior to September 1, 1966, the rental price for a 2-bedroom house was $45.00 and $50.00 for a 3-bedroom house. These rates covered rent, gas, electric, and water utility charges. Employees pay their rent by payroll deduction and all employees presently occupying company housing units have authorized in writing such payroll deductions.

No employee of Respondent is required to live in the company housing at Silver Bell. There were no vacancies as of the time of the hearing in the 2 and 3-bedroom houses and there is usually a waiting list for these houses. The Respondent's usual policy is to ask the family of an employee who dies to vacate within a reasonable period of time, company housing which had been occupied by the employee and his family.

On July 22, 1966, Respondent, by letter to each tenant, notified the tenants of the 2-bedroom houses that their rent would be increased by $5 per month effective August 1, 1966; and the tenants of the 3-bedroom houses that their rent would be increased by $10 per month effective August 1. 1966. No rental increases were made effective as to the apartment units or the trailer spaces. The decision to increase rent and action taken pursuant to this decision by Respondent, was done by Respondent without notification to or bargaining and consultation with the Union. A few days later at a grievance meeting, the Union representatives advised the Respondent's officials at the grievance meeting, that any increase in rent must be negotiated with the Union. The Respondent Company told the Union representatives that the house rent was not a bargaining matter and that it was exclusively within the prerogative of management. The Union requested that the Respondent meet with the International and the Local Union to nego-

tiate any proposed rent increase. A meeting for this purpose was called by Respondent for August 17, 1966, at which meeting Respondent told representatives of the Union that it would not bargain about its decision to increase the rent. At this meeting, the Union representative told Respondent not to withhold any more money representing the raise in rent from employees' pay without getting authorizations for such additional sums. New leases and authorizations for increased payroll deductions were not obtained until sometime after August 1, 1966. The rent increases went into effect on September 1, 1966. The rent increases effected by the Respondent on September 1, 1966, were the first and only increases in rent on the 2- and 3-bedroom housing units since 1952, which is the date when Respondent first provided company housing.

Union Representative Avenetti was a member of the Union's negotiating committee at the 1956 negotiations and at all subsequent negotiations including the 1964 negotiations. Avenetti testified that at the 1956 negotiations, a Mr. Sabatino, who was the Union's international representative and chief negotiator, requested of the Respondent's negotiators an assurance that rents on company housing would not be increased so as to offset any increases in pay that might be arrived at from negotiations. At the 1959 negotiations, Avenetti was president of the Union and he testified that again Respondent's negotiators were asked by the Union if the rents would be increased and the Company was asked for a letter to the effect that rents would not be increased. The company witnesses denied this ever occurred in the contract negotiations of 1956 and 1959.

At the negotiations in 1961, 1962, and 1964, testified the Union's witnesses, the question of rent increases were posed again by the Union, and Respondent again assured the Union at the 1961, 1962, and 1964 bargaining meetings that the rents would not be raised. Again, the Company's witnesses denied the rent matter was ever discussed at

this or any other negotiation session between 1956 and 1964 inclusive.

There are no substantial salient discrepancies between the testimony of the General Counsel's witnesses and those called by the Respondent other than their diverse recollection whether the subject of rents for company housing was discussed in the various negotiations in the years prior to 1964. With respect to the 1964 negotiation meetings, it is found that Respondent's version which was corroborated, and which is consonant and consistent with the general pattern and sequence of events, is worthy of beliefs and therefore credited for the following reasons. Albert Avenetti, the Union's principal witness, testified that in 1956 he held a position as recording secretary with the Union and was also on the negotiating committee, and that he participated in the negotiations in 1956. Avenetti testified that at these negotiations a Mr. Sabatino, an International representative and chief negotiator of the Union, "wanted it clarified and in that respect assurance from the company that rents would not be increased so as to off-set any increase in pay that might be arrived at from negotiations." He further testified that at the 1959 negotiations the rental of property was again brought up when Avenetti (at that time president of the local union) asked Donald Jameson, a company official and negotiator, for reassurance that the rent would not be increased, and that Jameson gave him such reassurance. Then again, in the 1961-1962 sessions, Avenetti testified, the Company again reassured the Union, upon being asked for such reassurance by the Union, that the rent would not be increased, but that the Company would not give a letter to that effect or embody it in a contract. Avenetti also testified that in the 1964 negotiations Jameson again conceded, under questioning by the Union, that the rents would not be increased. But on cross-examination, Avenetti was asked if he ever gave an affidavit to anyone regarding the instant matter, to which Avenetti replied that he gave one to an investi-

gator of the National Labor Relations Board. The affidavit, which is dated October 10, 1966, was then produced and through cross-examination as to the contents of this affidavit, it was elicited from Avenetti by counsel for Respondent that the only statement with respect to rent increases included in the affidavit by Avenetti was that supposedly made by company negotiator Purvis in 1956, but Avenetti had made no mention in his affidavit of the statements which Avenetti testified were purportedly made by Jameson in 1959, 1961, 1962, and 1964. It is found, therefore, that the question of rental housing was not discussed by the parties during the negotiations which eventuated in the execution of the 1964 collective-bargaining agreement.

C. *Discussion*

By Section 8(a)(5) of the National Labor Relations Act, it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)." The latter section provides that employees' representatives shall represent all employees in their unit for the purposes of collective bargaining "in respect to rates of pay, wages, hours of employment or other conditions of employment." "Conditions of employment" are those generally accepted as provisions proper to the discharge of the mutual obligations of the employer and employees or even those which might be deemed fairly debatable which relate to the actual business operation.

The question as to whether the particular matter at issue lies within the scope of statutorily required collective bargaining has been at issue more frequently in recent years. In the past, most of the subjects of labor-management friction pertained to one or the other matters specified by the Act, the contested issue ordinarily having been whether the acts of the employer did, in fact, amount to collective bargaining. However, with the achievement of

the basic objectives of increased wages, reasonable hours and healthful working conditions, unions have directed their efforts more to matters outside the ambit of "rates of pay, wages, hours of employment, and other conditions of employment," and it is not too unreasonable to expect that such demands will more often be met with the contention that they represent matters of management prerogative, as to which there is no statutory requirement of negotiation.

The question posed in the instant case is whether the particular decision sought to be unilaterally justified by the Respondent with respect to its company-owned housing is a subject of mandatory collective bargaining within statutory phrase "terms and conditions of employment."[1] The basic question is whether the Company failed to confer in good faith with respect to wages or other conditions of employment. As was said by Justice Stewart, in his concurring opinion in the *Fibreboard* case:[2]

> It is important to note that the words of the statute are words of limitation. The National Labor Relations Act does not say that the employer and employees are bound to confer upon any subject which interests either of them; the specification of wages, hours, and

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[1] Courts have required bargaining about a great variety of matters that do not relate to the actual performance of work, including rentals of company houses, *N.L.R.B.* v. *Lehigh Portland Cement Co.*, 205 F.2d 821 (C.A. 4); checkoff of union dues, *N.L.R.B.* v. *Reed & Prince Mfg. Co.*, 205 F.2d 131, 136 (C.A. 1); group health and accident insurance, *W. W. Cross & Co.* v. *N.L.R.B.*, 174 F.2d 875 (C.A. 1); a profit-sharing retirement plan, *N.L.R.B.* v. *Black-Clawson Co.*, 210 F.2d 523 (dictum) (C.A. 6); an employee stock purchase plan, *Richfield Oil Corp.* v. *N.L.R.B.*, 231 F.2d 717 (97 C.A.D.C. 383); a retirement and pension plan, *Inland Steel Co.* v. *N.L.R.B.*, 170 F.2d 247 (C.A. 7); and union Security, *N.L.R.B.* v. *W. T. Grant Co.*, 199 F.2d 711 (C.A. 9); *N.L.R.B.* v. *Andrew Jergens Co.*, 175 F.2d 130 (C.A. 9).

[2] *Fibreboard* v. *N.L.R.B.*, 379 U.S. 203, 220.

other terms and conditions of employment defines a limited category of issues subject to compulsory bargaining. The limiting purpose of the statute's language is made clear by the legislative history of the present Act. As originally passed, the Wagner Act contained no definition of the duty to bargain collectively. In the 1947 revision of the Act, the House bill contained a detailed but limited list of subjects of the duty to bargain, excluding all others. In conference the present language was substituted for the House's detailed specification. While the language thus incorporated in the 1947 legislation as enacted is not so stringent as that contained in the House bill, it nonetheless adopts the same basic approach in seeking to define a limited class of bargainable issues.

The phrase "conditions of employment" is no doubt susceptible of diverse interpretations. At the extreme, the phrase could be construed to apply to any subject which is insisted upon as a prerequisite for continued employment. Such an interpretation, which would in effect place the compulsion of the Board behind any and all bargaining demands, would be contrary to the intent of Congress, as reflected in this legislative history. Yet there are passages in the Court's opinion today which suggest just such an expansive interpretation, for the Court's opinion seems to imply that any issue which may reasonably divide an employer and his employees must be the subject of compulsory collective bargaining.

Only a narrower concept of "conditions of employment" will serve the statutory purpose of delineating a limited category of issues which are subject to the duty to bargain collectively. Seeking to effect this purpose, at least seven circuits have interpreted the statutory language to exclude various kinds of management decisions from the scope of the duty to bargain. In common parlance, the conditions of a person's

employment are most obviously the various physical dimensions of his working environment. What one's hours are to be, what amount of work is expected during those hours, what periods of relief are available, what safety practices are observed, would all seem conditions of one's employment. There are other less tangible but no less important characteristics of a person's employment which might also be deemed "conditions"—most prominently the characteristic involved in this case, the security of one's employment. On one view of the matter, it can be argued that the question whether there is to be a job is not a condition of employment; the question is not one of imposing conditions on employment, but the more fundamental question whether there is to be employment at all. However, it is clear that the Board and the courts have on numerous occasions recognized that union demands for provisions limiting an employer's power to discharge employees are mandatorily bargainable. Thus, freedom from discriminatory discharge, seniority rights, the imposition of a compulsory retirement age, have been recognized as subjects upon which an employer must bargain, although all of these concern the very existence of the employment itself.

While employment security has thus properly been recognized in various circumstances as a condition of employment, it surely does not follow that every decision which may affect job security is a subject of compulsory collective bargaining. Many decisions made by management affect the job security of employees. Decisions concerning the volume and kind of advertising expenditures, product design, the manner of financing, and sales, all may bear upon the security of the workers' jobs. Yet it is hardly conceivable that such decisions so involve "conditions of employment" that they must be negotiated with the employees' bargaining representative.

> In many of these areas the impact of a particular management decision upon job security may be extremely indirect and uncertain, and this alone may be sufficient reason to conclude that such decisions are not "with respect to . . . conditions of employment." Yet there are other areas where decisions by management may quite clearly imperil job security, or indeed terminate employment entirely. An enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. If, as I think clear, the purpose of § 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area.

In two cases where the Board found that employers unlawfully refused to bargain on the subject of company housing, the courts agreed that such housing is a mandatory bargaining subject if under the circumstances the terms of occupancy of company houses *affect conditions of employment.*[3] Enforcing the Board's order in the *Lehigh* case, the Fourth Circuit made it clear that its earlier decision in *Hart Cotton Mills*[4] was not intended to require

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[3] *N.L.R.B.* v. *Lehigh Portland Cement*, 205 F.2d 821 (C.A. 4); *N.L.R.B.* v. *Bemis Bros. Bag Co.*, 206 F.2d 33 (C.A. 5).

[4] *N.L.R.B.* v. *Hart Cotton Mills, Inc.*, 190 F.2d 964.

that, in order to be a proper bargaining subject, company houses must be a necessary part of the enterprise, or their occupancy must affect the workers' pay. It is sufficient, the court said, that "*their ownership or management materially affects the conditions of employment.*" [Emphasis supplied.] This prerequisite, the court concluded, was met in the *Lehigh* case because company house rents were below the prevailing rate for private housing, and 25 percent of the employees who occupied company houses had the additional advantage of residing near the plant where other housing was hard to get. On the other hand, the Fifth Circuit in the *Bemis* case held that the bargaining order was not sufficiently supported by the facts of the case.[5] Unlike the Fourth Circuit, the Fifth Circuit took the view that company housing may not be regarded as a condition of employment unless there is "some necessity, either imposed by the employed or by the force of circumstances" which requires the employee to subject himself to the conditions of occupancy of company housing. According to the court, other adequate housing appeared to be available, and rentals charged by the employer were not "so low as to be partial remuneration for services and, therefore, in effect wages."

The General Counsel states that the Union at no time meant to forego any right nor waive its right to bargain about company housing. Moreover, he argues, although the collective-bargaining agreement executed by the parties in 1964 was silent with respect to company housing, this silence does not constitute a relinquishment of the Union's statutory right to bargain concerning any changes in the rental payments for such housing. Accordingly, the General Counsel concludes, when the Respondent Company unilaterally increased these rents, it thereby violated Section 8(a)(5) of the Act.

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[5] Cited in footnote 3.

It is by now well settled that an employer violates his duty to bargain in good faith within the meaning of Section 8(a)(5) of the Act when he unilaterally puts into effect wage increases or otherwise unilaterally changes terms and conditions of employment of employees, either without discussion with the latter's representative, or before an impasse is reached.[6] In this regard, what the Supreme Court said in *N.L.R.B.* v. *Katz, supra,* at page 747 is appropriate here:

> "Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must, of necessity obstruct bargaining, contrary to the congressional policy. It will often disclose an unwillingness to agree with the union. It will rarely be justified by any reason of substance . . . we do not foreclose the possibility that there might be circumstances which the Board could or should accept as excusing or justifying unilateral action, . . .

Therefore, unilateral action by a party to a collective-bargaining agreement is not in itself an unfair labor practice as a distinction must be made between employing the term as a conclusion of law and a descriptive act. For example, if the employer is not required to bargain, as a matter of law, upon a particular matter, as where the subject under discussion is not cognizable under the terms of Section 9(a) of the Act,[7] then the employer is free to

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[6] *N.L.R.B.* v. *Benne Katz, etc., d/b/a Williamsburg Steel Products Co.,* 369 U.S. 736; *Ken's Building Supplies,* 142 NLRB 235, enfd. 333 F.2d 84 (C.A. 6); *R. C. Can Company,* 144 NLRB 210, enfd. as modified 340 F.2d 433 (C.A. 5).

[7] The subjects of bargaining listed under this section are "rates of pay, wages, hours of employment, or other conditions of employment."

take unilateral action with impunity.[8] If, however, the matter is a proper subject for bargaining, and the employer during the course of negotiations unilaterally changes the conditions of employment without first consulting his employees' representative, generally, this is an unfair labor practice.[9]

In determining whether a unilateral act amounts to an unfair labor practice, a distinction must also be made as to when, in relation to the signing of a collective-bargaining agreement, the complained of act occurred. Unilateral action taken during a union organizational campaign at a time when the employees' duly authorized representative has not yet been recognized by the employer, or after recognition of the union but before execution of an agreement, is sometimes part of a scheme to undermine the union by bypassing it; or its purpose may be to avoid the duty to bargain. Such unilateral action is usually an unfair labor practice as it undermines the representative status of the union by indicating to employees that it is not necessary for them to belong to a union in order to obtain satisfactory employment terms.[10] On the other hand, unilateral action taken after recognition of the Union and during the term of the contract, should be treated on a different basis as the determinative factors existent in the situation described immediately above are usually no longer present after the

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[8] *American Radio Association,* 82 NLRB 1344.

[9] *N.L.R.B.* v. *Katz, etc.,* 369 U.S. 736; *N.L.R.B.* v. *Crompton-Highland Mills, Inc.,* 337 U.S. 217; *Ken's Building Supplies,* 142 NLRB 235, enfd. 333 F.2d 84 (C.A. 6); *Tower Hosiery Mills, Inc.,* 81 NLRB 658; cf. *W. W. Cross & Company, Inc.,* 77 NLRB 1162. There are exceptions to this general principle of law: There is no duty to bargain during a slowdown (*Phelps Dodge Copper Products Corporation,* 101 NLRB 360, 368); violation of a no-strike provision (*United Elastic Corporation,* 84 NLRB 768, 773); cf. *Montgomery Ward & Co., Incorporated,* 39 NLRB 229 where negotiations were "in suspension."

[10] *Langlade Veneer Products Corporation,* 118 NLRB 985.

parties have entered into a collective-bargaining agreement.[11]

By definition, a collective-bargaining agreement is the embodiment of the terms and conditions of employment reached as the result of contract negotiations between the employer and the accredited representative of his employees. This collective-bargaining relationship, however, does not carry with it the connotation that all subjects discussed in the procontract bargaining sessions ultimately found their way into the agreement as it is common knowledge that many proposals considered during the negotiations leading to the agreement are not memorialized in the agreement as it is finally executed because many proposals are either discarded, rejected, opposed, or disagreed with by the parties during precontract negotiations.

Section 8(d) of the Amended Act, provides, in pertinent part, as follows:

> . . . the duties so imposed [bargaining] shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

Thus, there is no legal duty under the provisions of Section 8(d) to bargain about a condition of employment covered by an existing agreement for a fixed period, nor can either party be required to discuss or agree to modification of any of the terms of a contract which would be-

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[11] Cf. *McDonnell Aircraft Corporation*, 109 NLRB 930, 934. This case at page 935 also points out that a distinction must be made between contract negotiations and contract administration in considering the Board's role in these situations. See also *Crown Zellerbach Corporation, Sillcoos Division*, 95 NLRB 753, 754.

come effective at a time prior to the expiration of the contract.

The effect of Section 8(d) was discussed in the *Jacobs Manufacturing Company* case.[12] In that proceeding, the contract was to continue for two years with a wage reopener clause after one year. When the contract was in effect for one year, the union, under the wage reopener clause, asked for an increase in wage rates, and revision in an *existing* group insurance plan and also requested the *establishment* of an employees' pension fund. During precontract negotiations, the details of the group insurance plan were thoroughly discussed and the final agreement on it included in the provisions of the executed contract. A pension plan, however, had never before been discussed by the parties. The Board held that the employer's refusal to discuss pensions with the union was a violation as it had not been previously raised or discussed by the parties nor mentioned in the contract. However, held the Board, it was not a violation for the employer to refuse to discuss the insurance program during the wage reopening negotiations although it was not mentioned in the existing contract because the parties had "consciously explored" the subject during precontract bargaining sessions.[13]

When the Board's order in the *Jacobs* case was enforced by the Court of Appeals for the Second Circuit, it stated:[14]

> Before the National Labor Relations Act was amended by the Taft-Hartley Act an employer was under a duty, upon request, to bargain with the representa-

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[12] 94 NLRB 1214.

[13] See *Long Lake Lumber Company*, 160 NLRB No. 123, where the Board reminded employers that they have a "continuous duty to bargain about the 'unwritten terms' of a contract when those unwritten terms deal with wages, hours, and other conditions of labor."

[14] 196 F.2d 680, 683-684 (1952).

tives of his employees as to terms and conditions of employment whether or not an existing collective bargaining agreement bound the parties as to the subject matter to be discussed. [Citing case.] However, § 8(d) of the amended Act . . . narrowed this requirement. . . . The respondent's position is that, except as to subjects expressly reserved for further negotiations in a reopening clause, any fixed period contract creates a static period in the entire industrial relationship between the employer and his employees, for the term of the contract, even as to aspects of that relationship which were not covered . . . in the negotiations leading up to it.

We, however, agree with the Board that § 8(d) cannot fairly be given such a broad effect. The purpose of this provision is, apparently, to give stability to agreements governing industrial relations. But, the exception thus created necessarily conflicts with the general purpose of the Act, which is to require employers to bargain as to employee demands whenever made to the end that industrial disputes may be resolved peacefully without resort to drastic measures likely to have an injurious effect upon commerce, and the general purpose should be given effect to the extent there is no contrary provision. Since the language chosen to describe this exception is precise and explicit, "terms and conditions contained in a contract for a fixed period," we do not think it relieves an employer of the duty to bargain as to subjects which were neither discussed nor embodied in any of the terms and conditions of the contract. Therefore, we hold that it was the Respondent's statutory duty to bargain on the subject of pensions. In so deciding, however, as we have already indicated in commenting upon the Board's ruling concerning the group insurance issue, we do not intend to pass upon the effect, if any, on the duty to bargain, of mere previous discussion of a

subject without putting any terms and conditions as to it into the contract.[15]

Conclusions

In the *Bemis* case, 96 NLRB 728, the Board reversed the Trial Examiner's finding dismissing the complaint in which he concluded that because the respondent and union negotiated a comprehensive contract, although the agreement did not include any provision relating to company housing facilities, that the respondent company had not refused to bargain in good faith within the meaning of Section 8(a)(5) when it insisted the rental of company housing had nothing to do with "working conditions" and is therefore not the subject of collective bargaining.

The Board in reversing the Examiner and finding a violation held that "employer provided living accommodations are encompassed within the terms 'wages' and 'conditions' of employment where such accommodations are an integral part of the employment relation." The Board citing *N.L.R.B.* v. *Hart Cotton Mills, Inc.*, 190 F. 2d 964 (C.A. 4) stated: ". . . the Company's contention that company houses are not a proper subject of negotiation with a union representing the employees cannot be sustained as a general proposition," and that *"the subject is one in which the employees have so great an interest in connection with their work that it should be a subject of bargaining between the employer and the representatives of the men."* [Emphasis supplied] 96 NLRB 728, 731.

In the *Bemis* case, the lease provided that the premises could not be subleased and that only company employees were eligible to rent the dwelling units except with respect to two ministers serving the village and the manager of the

[15] In *N.L.R.B.* v. *Niles-Bement-Pond Company*, 199 F.2d 713 (C.A. 2), the court followed the same doctrine and held that a union could demand negotiation over a Christmas bonus when there was no provision concerning the item in the contract.

village store. Rent could be deducted from wages owed the employees and occupancy was conditioned upon continuing in the Respondent's employ. In evaluating these various factors, the Board concluded "*that the interest of the employees in the subject of company housing rentals is so closely connected with their work that it cannot be deemed a nonbargainable subject.*" [Emphasis supplied.] Id. at 731-732.

The Board found no merit in the respondent's contention that it was not required to bargain because only a portion of the employees in the bargaining unit lived in company-owned dwellings. "Of the 295 to 300 dwelling units owned by the Respondent," stated the Board, "approximately 85 percent or 250 are rented to employees in the unit. This is a substantial portion of the unit. But we have held that 'the Act vests in a bargaining representative the authority to bargain for *each and all* of the employees in an appropriate unit, and correspondingly requires an employer to bargain on matters that affect only a portion of the employees in the unit, regardless of what that portion may be.' We have also held that the fact that whether or not employees are free to live in company houses does not alter the employer's statutory obligation." In concluding, the Board found company owned-and-operated housing units were a mandatory subject of collective bargaining because *the rental of such units is an integral part of the subject of company housing.* [Emphasis supplied.] Id. at 732.

In the *Lehigh* case, 101 NLRB 529, at 532-533, the facts were as follows: Of the 65 dwelling units owned by the Respondent, 50 were rented to employees in the bargaining unit, 10 were rented to nonunit employees, including supervisors and clerical employees, and 5 were rented to nonemployees. Of these 5 dwelling units, 3 were occupied by persons who were employees when their occupancy commenced but who were no longer employees of the Respondent; 1 was occupied by the mother of an employee who

paid the rent but did not live there; and 1 which included a house and farm was leased to a nonemployee who in turn sublet it to an employee with the approval of the Respondent. Sixty-two of the company-owned dwellings were within a radius of 1 mile from the plant with the majority situated within ½ mile or less of the plant. One hundred thirty-one employees owned their homes within a 1- to 20-mile radius of the plant, and 57 employees rented private housing within a 1- to 35-mile radius of the plant. Housing in the vicinity of the plant was in strong demand. Maintenance and repairs of the company-owned dwelling units was taken care of by the Respondent's department of valuation and property. The amount of the rent of the company-owned dwelling units varied with the size of the unit and with the conveniences within the unit. Some employees paid their rent in cash; the majority, however, had the same deducted from their paycheck after having first delivered a written authorization for such deduction to the Respondent.

The Respondent announced a rent increase on all of its dwellings. This was the only increase in rent in 14 years. When the union protested the rent increases, the company replied that company houses are not a proper subject of bargaining unless it can be shown that company houses are a necessary part of the enterprise and that they are rented at such rates to the employees as to represent a substantial part of the employees' remuneration.

The Examiner found a violation of Section 8(a)(5) for the following reasons: (1) the rents were so nominal as to represent a substantial part of the employees' remuneration in that the privilege of living in a company-owned dwelling represents an "emolument of value" because it saves employees expenses of transportation if they had to live elsewhere; (2) housing was scarce in the area so that the employees were necessarily obliged to live in company facilities if they desired to work at the respondent's plant; and (3) the tenancy of company-owned houses is an in-

cident of the employer-employee relationship and therefore, the *rental of such units being an integral part of the subject of company housing is a mandatory subject of collective bargaining.*

The Board affirmed the Trial Examiner with no comment other than a footnote in which it stated at page 529:

> Like the Trial Examiner we conclude that in this case the rental of the company-owned houses was a matter included among the conditions of the employees' employment and bargainable as a condition of employment, *whether or not it is treated as included within the term "wages" as used in Section 9(a) of the Act.* We do not disagree with the Trial Examiner in finding that such subject matter is properly considered within the term "wages." [Emphasis supplied.]

In *Florida Citrus Canners Cooperative,*[16] the employer was held to have committed an unfair labor practice by evicting strikers from company-owned houses while the strikers were engaged in an unfair labor practice strike. The Board held that *the employees rental of such houses was a valuable incident of the employer-employee relationship even though the rental of housing accommodations does not constitute wages.* The Board stated:

> The Trial Examiner found that the rentals of the Respondent's housing units were low enough to constitute partial remuneration for services, and, in effect, wages. We do not adopt this finding. There is no evidence in the record that the employees who lived in company housing were paid less wages than those who lived elsewhere.
>
> Having found that the strikers were unfair labor practice strikers, their discharge during the strike, even though the Respondent may have assumed that

[16] 124 NLRB 1182.

the strikers were engaged in an economic strike, is, of course, violative of the Act. The record shows that Respondent's housing accommodations were rented only to employees or families of employees. Thus, it was as a result of the employer-employee relationship that employees were entitled to live in these accommodations in the first instance. Living nearer to one's place of work than the majority of the employees, and, more particularly at a nominal rental, was a substantial advantage for the employee-occupants.

Accordingly, we find that *the rental of the housing accommodations of the Respondent was a valuable incident of the employer-employee relationship* within the meaning of Section 8(a)(3) of the Act. The eviction or attempted eviction from these rental units was coercive as well as discriminatory when applied because the employees were on strike, and constituted unlawful interference with their statutory rights. [Emphasis supplied.]

It would appear from an analysis of the above-cited three cases that beginning with the *Bemis* and *Lehigh* cases and confirmed as recently as 1959 in the *Florida Citrus Canners* case that the rental of company housing accommodations is by its very nature an integral part of the employment relation and a valuable incident of the employer-employee relationship and thus, necessarily included among the conditions of the employees' employment and bargainable as a condition of employment whether or not it is treated as included within the term "wages" as used in Section (9a) of the Act.[17] This is confirmed by the above-emphasized statements of the Board and also the Board's statement in the *Lehigh* case that company housing is "included among the conditions of employees' employment and bargainable as a condition of employment, whether or not

[17] See page 12, *supra*.

it is treated as included within the term 'wages' as used in Section (9a) of the Act." Accordingly, company housing is treated by the Board in a manner unrelated to and not limited by the narrow issue of whether rents are partial remuneration for services, and, in effect wages.[18]

Based upon Board precedent, *supra*, and for the reasons cited therein, it is found that the Respondent was under an obligation to bargain with the Union concerning rent increases. By failing to notify the Union of the proposed rent increases for its housing, by refusing upon request, to bargain concerning such charges, and by unilaterally determining the reasonableness of the proposed rental changes, the Respondent has acted in derogation of its duty under the statute and has failed to bargain collectively in violation of Section 8(a)(5) and (1) of the Act.[19]

III. The Remedy

Having found that the Respondent, by failing to notify the Union of the proposed rental changes for its housing at Silver Bell, Arizona, by refusing upon request to bargain concerning such changes, and by unilaterally determining the reasonableness of the proposed rental increases, has refused to bargain collectively. In order to effectuate the policies of the Act, it shall be recommended that the Respondent be required to notify the Union of any rental

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[18] Cf. *Florida Citrus Canners Cooperative*, at page 12, above. See also page 7, *supra*, for the principle that if the terms of occupancy of company housing affect conditions of employment, it is a mandatory subject of bargaining.

[19] The above conclusions apply only to a "company town," that is, a community which, including premises occupied by the workers, is owned by the employer and not to a situation where the company rents only a few dwellings to its employees. Company towns result from the fact that certain firms establish themselves in uninhabited areas thus necessitating the provision of housing, school, and other facilities by the firm in order to obtain the necessary labor.

changes that in the future it may desire to effect, that the Respondent be required, upon request, to bargain collectively with the Union as the exclusive representative of the employees in the appropriate units with respect to the rentals charged for its housing accommodations and trailer parking areas, and that the Respondent be required to refrain in the future from determining the reasonableness of proposed changes in such rentals whereby employees in these units may be affected (excluding nonemployees), without prior consultation with the Union.

Upon the foregoing findings of fact, and upon the entire record in the case, there are made the following:

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization withing the meaning of Section 2(5) of the Act.

3. All employees of the Respondent in the classifications set forth in the agreement between the Respondent and the Union, effective during the period from November 1, 1964, through September 30, 1967; excluding all other employees, office clerical employees, guards, watchmen, and supervisors as defined in the Labor Management Relations Act, as amended, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. The Union at all times material has been and is the exclusive representative of all the employees in the aforesaid bargaining unit within the meaning of Section 9(a) of the Act.

5. By refusing on and since about July 22, 1966, to bargain collectively with the Union as the representative of the employees in the aforesaid bargaining unit, the Respond-

ent has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 7 of the Act.

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in this case, it is recommended, pursuant to Section 10(c) of the National Labor Relations Act, as amended, the issuance of the following,

ORDER

Respondent, American Smelting and Refining Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing, upon request, to bargain collectively with Local Union 13886, International Union of District 50, United Mine Workers of America (IND.), as the exclusive representative of all the employees in the unit set forth and described in paragraph 3 of the Conclusions of Law herein with respect to the reasonableness of proposed changes in rentals at the Respondent's Silver Bell, Arizona, operation.

(b) Making determinations with respect to the reasonableness of rental changes and affecting any employees in the unit above-described, without prior consultation with the above-named Union.

(c) In any like or related manner interfering with the efforts of the above-named Union to bargain collectively on behalf of the employees in the above-described unit.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Local Union 13886, International Union of District 50, United Mine

Workers of America (IND.), as the exclusive representative of all its employees in the aforesaid unit with respect to the reasonableness of any changes, now in effect or hereafter proposed, in rentals charged employees at company-owned housing and trailer parking areas at its Silver Bell, Arizona, facility.

(b) Post at its operation in Silver Bell, Arizona, copies of the attached notice marked "Appendix."[20] Copies of said notice to be furnished by the Regional Director for Region 28, shall, after being duly signed by a representative of the Respondent, be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the said Regional Director for Region 28, in writing, within 20 days from the date of the receipt of this Decision and Recommended Order, what steps the Respondent has taken to comply herewith.[21]

Dated:

HENRY O. SAHM
Henry Sahm
Trial Examiner

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[20] If these Recommendations are adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words, "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. If the Board's Order is enforced by a decree of the United States Court of Appeals, the notice will be further amended by the substitution of the words "A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER" for the words "A DECISION AND ORDER."

[21] If these Recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 28, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE RECOMMENDED ORDER
OF A TRIAL EXAMINER OF THE

NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT

we hereby notify our employees that:

WE WILL NOT refuse, upon request, to consult and bargain collectively with LOCAL UNION 13886, INTERNATIONAL UNION OF DISTRICT 50, UNITED MINE WORKERS OF AMERICA (IND.), as the exclusive representative of all the employees in the bargaining unit described herein with respect to the reasonableness of any changes in rentals charged for our company housing and trailer parking areas at Silver Bell, Arizona.

AMERICAN SMELTING & REFINING CO.
(Employer)

By .....
(Representative) (Title)

Dated .....

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Federal Building and U.S. Court House, 500 Gold Avenue, Room 7011, Albuquerque, New Mexico, 87101, Telephone No. 247-2538.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1296

AMERICAN SMELTING AND REFINING COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 406 F. 2d 552. The Board's decision and order (Pet. App. 10a-14a) are reported at 167 NLRB No. 26.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1969 (Pet. 2; Pet. App. 6a-9a). The

petition for a writ of certiorari was filed on April 21, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the finding of the National Labor Relations Board that rental of company-owned housing was a "condition of employment" at the company's nearby mine, so that the company should not have raised the rents for such housing without first bargaining with the employees' union representative.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 591, 29 U.S.C. 151, *et seq.*) are set forth at pages 2-3 of the petition.

STATEMENT

1. The petitioner-company operates a copper mine and related facilities at Silver Bell, Arizona, 40 miles from Tucson. In 1951, at the same time that it started its mining operations at Silver Bell, the company began the construction of a townsite there. The first houses were occupied in 1952. The town presently consists of 175 two- and three-bedroom homes, 24 apartment units, and 50 trailer sites, as well as a grocery store, church, barber shop, post office, and service station. (Pet. App. 17a-18a.)

As of October 12, 1966, the Company employed 317 persons at Silver Bell, 264 of whom were production

and maintenance workers represented by the union (Pet. App. 18a).[1] Of these 264, 165 (approximately 65 percent) lived in the company housing at Silver Bell, as did 33 salaried employees not in the unit.[2] Most of the remaining 89 employees in the bargaining unit lived in Tucson, and a few lived in the intermediate communities of Marana and Cortaro, which are approximately 25 miles from the Silver Bell mine. (Pet. App. 18a.)

Although no employee is required by the company to live in its houses, they were all occupied at the time of the Board hearing and there is usually a waiting list. Employees enter into written leases with the company and their rent is paid by deduction from their pay. Prior to September 1, 1966, the rental price was $45.00 for a two-bedroom house and $50.00 for a three-bedroom house, including utilities (paid by the company). The residences and the townsite are maintained by other company employees. Tenants were usually requested to vacate when the worker's employment terminated. (Pet. App. 19a.)

On July 22, 1966, the company sent a letter to each of its tenants announcing that, effective August 1, the rent would be increased $5 and $10 respectively on two- and three-bedroom houses. This was the first rent increase since the houses were opened in 1952.

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[1] Local Union 13886, International Union of District 50, United Mine Workers of America.

[2] Five or six individuals not employed by the company also occupy company housing—the barber, the minister, the grocery clerk, and a few employees of a subcontractor (Pet. App. 18a).

The union was not consulted prior to this decision to raise rents. (Pet. App. 19a-20a.)

Shortly after the raise was announced, union representatives advised the company that any increase in rents would have to be negotiated. Company officials replied that rentals were not a bargaining matter and were "none of the Union's business" (Pet. App. 19a; Tr. 46). At a subsequent meeting on August 17, 1966, the Company again refused to bargain about the rent increases, and the new rentals went into effect on September 1, 1966 (Pet. App. 20a).

2. The Board held that, in the circumstances of this case, the company housing had a substantial and material effect on the employees' conditions of employment; that the rent for such housing therefore was a mandatory subject of collective bargaining; and that the company had violated Section 8(a)(5) and (1) of the Act by raising rents without first bargaining with the union (Pet. App. 11a, n. 1.) The Board ordered the company to cease and desist from unilaterally increasing the rents for its housing without prior notification to, and bargaining with, the union; to reinstate the rental charges in effect prior to the unilateral increases; to make whole all employees in the unit who paid the increased rental charges; and to post appropriate notices (Pet. App. 12a, 40a-41a).

The court of appeals enforced the Board's order. It stated: "We think that the determination whether the rental of company housing constitutes a 'condition of employment' within the meaning of Section 9(a) of the Act depends upon an evaluation of the relevant facts of the particular case" (Pet. App. 3a). The

court held that the Board was justified in concluding, on the facts of this case, that company housing was a "condition of employment" (Pet. App. 5a).

ARGUMENT

1. Petitioner apparently concedes (Pet. 2) that where company housing "materially and substantially affects the terms and conditions of employment" it may be a mandatory subject of bargaining. It contends, however, that there is no "substantial evidence in the record" to sustain such a finding in this case. An issue of this kind, which turns on the particular facts, is properly left to resolution by the court of appeals, not this Court. See *National Labor Relations Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502-503.

In any event, the record supports the Board's finding that the company housing here materially affected the terms and working conditions of the company's employees. As the court below noted: "Silver Bell itself is located at the end of a gravel road, twenty miles from the nearest main road * * * the nearest private housing is about twenty-five miles away, two-thirds of the union members live in the company housing, there is a waiting list for the housing, the rent has not been raised in the past twelve years, and public transportation is apparently not readily available" (Pet. App. 4a).

2. Contrary to petitioner's contentions (Pet. 9-13), there is no conflict of decisions. The facts of the present case are similar to those in *National Labor*

Relations Board v. *Lehigh Portland Cement Co.*, 205 F. 2d 821, where the Fourth Circuit upheld the Board's conclusion that company housing constituted a condition of employment. Although the Fifth Circuit, in *National Labor Relations Board* v. *Bemis Bros. Bag Co.*, 206 F. 2d 33, reached a contrary result, the court there merely found "the record insufficient in facts to authorize the Board's conclusion *in this case.*" 206 F. 2d at 35 (emphasis added). As the court below explained in distinguishing *Bemis Bros.*, in that case "the company plant and housing were on the edge of a town of thirteen thousand. Only about a third of the employees lived in the company houses, and housing and public transportation were available" (Pet. App. 4a).

The other cases cited by petitioner are wholly inapposite. *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203, involved the question whether there was a duty to bargain over the subcontracting of certain work, and *Westinghouse Electric Corp.* v. *National Labor Relations Board*, 387 F. 2d 542 (C.A. 4), involved the duty to bargain over the prices charged by an independent contractor operating cafeterias in the company's plants.[3]

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[3] Petitioner's contention (Pet. 13-15) that employer-owned housing is not a subject which lends itself to the processes of collective bargaining rests in part on the erroneous premise that there are no arbitration awards dealing with company housing. In fact, there are such awards; see, *e.g.*, *Columbian Carbon Company*, 67-1 Labor Arbitration Awards 8314. To be sure, the company-housing cases are less numerous than those dealing with subcontracting, the subject involved in *Fibreboard, supra.* This paucity, however, is more reasonably

3. Finally, there is no substance to petitioner's contention (Pet. 16-18) that the Board based its decision on "unsupported presumptions and guesses." In view of the undisputed facts that there had been no increase in the rents of the company houses for many years, that over two-thirds of the unit employees lived in such houses, that there was a continuous waiting list, and that the nearest other housing was 25 miles away, the Board acted reasonably in inferring that the availability of company housing constituted a direct advantage to the employees in fulfilling their employment duties. An administrative agency like the Board "may infer * * * from the proven facts such conclusions as reasonably may be based upon the facts proven." *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 800.

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attributed to the small amount of company housing still in existence—not to be inappropriateness of that subject for collective bargaining.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DOMINICK L. MANOLI,
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MAY 1969.

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